Gulf Coast Automotive Warehouse, Inc. *and* United Food and Commercial Workers International Union, AFL-CIO-CLC, Local 455.[1] Case 23-CA-6521

June 10, 1981

DECISION AND ORDER

On February 9, 1981, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The name of the Charging Party appears as amended at the hearing.

[2] The General Counsel asserts that the Administrative Law Judge's findings of fact and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the Respondent. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the intregrity or competence of a trier of fact."

[3] In reaching our decision herein we do not rely on fn. 9 of the Administrative Law Judge's Decision insofar as it purports to represent the General Counsel's position in this matter. We do emphasize, however, as did the Administrative Law Judge, that the issue presented here was limited to the narrow one of an alleged unilateral change in working conditions in violation of Sec. 8(a)(5), and not Respondent's general bargaining obligation with respect to the subject of administering polygraph examinations.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard before me in Houston, Texas, on December 11, 1980.[1] The complaint, issued July 7, 1977, is based on a charge filed May 16, 1977, by United Food and Commercial Workers International Union, AFL-CIO, CLC, Local No. 55 (herein called Union).[2] The complaint alleges that Gulf Coast Automotive Warehouse, Inc. (herein called Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act (herein called Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of Texas, maintaining its principal office and place of business in Houston, Texas, where it is engaged in the storing and wholesale distribution of automotive parts and related products. During the past 12 months, which period is representative of all times material herein, Respondent received goods and supplies valued in excess of $5,000, which were shipped directly to it in Houston from points outside the State of Texas.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[3]

Respondent deals in the sale of parts for automobiles, and since approximately 1972 has used polygraph tests in order to maintain security of the business. Those tests have been, and presently are, administered for Respondent by an independent business organization. The tests have not been given to applicants and employees on a regular schedule, and not all applicants and employees have been tested. Respondent does not budget, or otherwise provide, any of the tests in a regular manner; the tests are given, and paid for, in an irregular manner. Over the years, the costs of individual tests have diminished, from $35 to $20.

Following an election conducted by the National Labor Relations Board (herein called the Board), the Union was certified by the Board on October 28, 1976, as the exclusive-bargaining representative of Respondent's employees in the following unit, and the Union presently represents those employees:

> All full-time and regular part-time employees working at Respondent's warehouse, including zone foremen, truck drivers, truck mechanics, order pullers, returns and defects employees, stockers, rollers, foxers and utility housekeeping employees, but excluding order takers, pricers, accounts payable

[1] All dates hereinafter are within 1977, unless stated to be otherwise. The hearing was delayed pending judicial resolution of matters not involved in these proceedings.

[2] The name of the Union was amended at the hearing by agreement of the parties.

[3] This background summary is based on credited testimony and evidence not in dispute.

clerk, temporary employees, inventory clerks, guards and supervisors as defined in the Act.[4]

In October 1975 an employee named Jim Kielty, who then had been working for Respondent approximately 2 years but who was not suspected of anything, was told he had to take a polygraph test, and if he refused, he had to resign from his job. Kielty refused to take the test, and was discharged October 30, 1975.

Approximately in July 1976 an employee named Paul Gonzales was suspected of stealing from Respondent. Gonzales took a polygraph test, failed to pass it, and was discharged. The Union filed an unfair labor practice charge with the Board because of the discharge, but the charge later was withdrawn.

A few weeks prior to the Board-conducted election held on August 13, 1976, a union representative named Arlene Carrow accompanied by former employee Larry Acker, called on Dennis Mabry, Respondent's president, to request that Mabry reemploy Acker, who had been discharged because he refused to take a polygraph test. Acker and two other employees were suspected of stealing locks. The other two employees took polygraph tests, but Acker refused. Mabry declined to rehire Acker, and an unfair labor practice charge was filed with the Board, alleging that Respondent violated Section 8(a)(3) of the Act. The charge later was withdrawn.

In May 1977 one of Respondent's employees was Tom Covington. Covington was arrested by police, and Mabry went to the station to post bail for Covington. While at the station, Mabry learned for the first time that Covington had a record as a convicted embezzler. Mabry returned to the warehouse after learning that the police would not release Covington on bail, and talked with employee Cheryl Lee Nepveux and two other employees. Mabry informed the three employees that Covington had to return to prison and would not be back to work for Respondent, although Mabry had no reason to suspect Covington of stealing anything from Respondent and would consider Covington for rehire if he did return and asked for a job. That same day Hector Martinez, Respondent's assistant warehouse manager who worked under Warehouse Manager Hughie Harmon, met with approximately 30 to 45 of Respondent's employees in Harmon's office. Martinez informed the employees of Covington's situation, without naming Covington, and said that, because of the situation, all the employees must take polygraph tests relative to ". . . most of the stuff had to do with our employ, our applications."[5] Nepveux asked what would happen if the employees did not take the test, and Martinez replied that they would be discharged. A couple of days later the employees began to take the tests, leaving the warehouse to take them, two at a time, on Tuesday, Wednesday, and Thursday. Twenty-three employees were tested thereafter, which constituted almost all the warehouse employees.[6] The Union was not notified about the tests, and no employee was disciplined as a result of the tests.

On May 16, 1977, James C. Phillips of the Union wrote a letter to Mabry, reading as follows:

> Dear Mr. Mabru:
>
> As you know, Retail Clerks Union, Local No. 455 has been certified as the exclusive bargaining representative for your employees in an appropriate bargaining unit, in Case No. 23-RC-4391. In our capacity as the duly designated and certified collective bargaining representative of your employees in said unit, we want to protest your imposition of a unilateral change in working conditions as a condition of continued employment without notice to or consultation with this Union.
>
> The unilateral change in working conditions we refer to is your demand that these employees submit to a polygraph test given by an operator of your selection under whatever conditions you choose to impose. We also understand that you have not supplied any of the employees with any specification of alleged offenses which would justify such drastic proceedings. We demand that you retract any orders to the employees to take polygraph tests or to submit to a polygraph test under these conditions, and to meet with us at the bargaining table for full bargaining on the subject in accordance with the bargaining commandment of the National Labor Relations Act. We think that you should furnish this Union with a list of persons you claim to have committed offenses grievous enough to justify this type of investigation together with an itemized statement of the facts the charge is based upon preliminary to our meeting on the question of whether employees should be required to submit to polygraph tests. Once we have received such a list together with the written specifications of the alleged offenses, we will be willing to meet with you at the earliest possible opportunity to bargain with you on this condition of employment as well as hours, wages and other conditions of employment to be incorporated in a collective bargaining contract.

On May 20, 1977, Respondent's representative, V. Scott Kneese, replied to the Union and stated, *inter alia*:

> With respect to Mr. Phillips' letter of May 16, 1977, there has been no unilateral change in working conditions. Polygraph examinations have been a long standing policy of GCAW. In fact, the Union withdrew a prior unfair labor practice charge involving polygraph tests (case number 23-CA-6158). Accordingly, any tests which may be required at the present or in the future constitute a mere continuation of past practice. Moreover, even if there had been a change, bargaining over such change would be inconsistent with GCAW's previously stated position.

General Counsel contends that, since the tests of May and June 1977 were different from tests given prior

[4] There is no bargaining contract between Respondent and the Union.

[5] This statement is from the credited testimony of Nepveux.

[6] The only exception of record was Nepveux, who credibly testified that she did not take the test.

thereto, Respondent was required under the Act to bargain with the Union prior to requiring employees to take the tests.

B. *Respondent's Policy Concerning Polygraph Tests*

Respondent has no written policy, or statement of policy, concerning the tests.

Mabry testified that, in 1978 and 1979, Respondent had a personnel manager whom he instructed to tell applicants concerning tests, but that testimony is irrelevant to the incident involved herein, which occurred in May 1977. Mabry further testified that applicants were advised of tests in 1976 and 1977, but Nepveux and employee Isabell McLearen testified that they did not take preemployment tests, which Mabry did not deny. Mabry credibly testified that office employees were required to take tests, and that he so advised them when he hired them. It is clear, and found, that at least some applicants, if not all, were told prehire and thereafter, that they may be given polygraph tests.

Mabry testified that, since 1972, he has had a policy concerning tests, and that he explained that policy in detail to Carrow in August 1976, when the Union charged Respondent with discharging Acker in violation of the Act. Mabry testified concerning this conversation with Carrow:

> Q. What did you explain to her about why you had polygraphs?
>
> A. Well, the fact that it's a security measure. There is so much stuff out there that people can just put in their pockets and walk out with it, it's just one of the few deterrents that I have and that if we let people get away with not taking polygraph tests, then, I have no security to speak of.
>
> Q. What did you tell her about how you give polygraph tests?
>
> A. Well, I just told her that we felt that we had a right to do it at any time, either at random or on suspicion or if someone had turned in a report saying that they saw somebody steal some thing. That we tried to screen people with polygraphs before we even hired them, although that clearly didn't happen all the time. We got busy and . . . .
>
> JUDGE STEVENS: What didn't happen all the time? You didn't give all applicants tests?
>
> THE WITNESS: That's correct. Before they were hired. We sometimes just got too busy and said we'll hire this guy and send him down next week to take a polygraph test. Sometimes we did and sometimes we didn't.
>
> BY MR. MCBEE:
>
> Q. Was there any further discussion with Ms. [Carrow]
>
> A. Well, other than just the fact that it had been our policy for a long time and that I wasn't going to hire Larry back. I can't remember anything else.

Carrow was not called to testify. General Counsel did not cross-examine Mabry concerning his conversation with Carrow. There is no dispute concerning the fact that the Union knew that Respondent used polygraph tests, both prior to and after the election conducted by the NLRB. Mabry was a convincing witness, and he is credited. It is found that, at all times since 1972, Respondent has had a policy of using polygraph tests as a security measure, and subjecting employees to tests prior to employment, post-employment upon suspicion of stealing, and post-employment in the absence of such suspicion.[7] It is further found that the Union was advised by Respondent of that policy in August 1976, and that the Union has not challenged that policy, or requested Respondent to bargain concerning the policy, prior to the incident involved herein.

C. *Respondent's Practice Concerning Polygraph Tests*

The fact that Respondent has used preemployment tests, without challenge or request for bargaining by the Union, since at least 1972 is not in dispute. Nepveux testified that she was not given such a test prior to employment, but Mabry credibly testified that preemployment tests were not given to all applicants, and that such tests were given on a rather loose basis; at times, tests were not given for lengthy periods. Former employee Isabell McLearen testified that she had not been given a preemployment test, but that she heard Loriana Freeman, a fellow-employee, state that she, Freeman, had taken a preemployment test. Both Nepveux and McLearen testified that they knew of no employee, or heard of no employee (other than Freeman), who had been given a preemployment or any other type of polygraph test, but that testimony is given no weight, since they would not necessarily know if tests were given to employees other than themselves.

General Counsel questioned Mabry and established through Respondent's records that Respondent gave preemployment tests to 21 individuals in June 1978 and 7 individuals in July 1978. There is no dispute concerning the fact that the Union did not challenge those tests.

General Counsel also questioned Mabry concerning several tests given in May and June 1979, dealing mainly with an individual's "suitability for employment," and also dealing with some who "may have taken some property from the company." The Union did not challenge any of those tests.

D. *Discussion*

General Counsel's case is based on the contention that the tests resulting from the Covington incident were new tests unrelated to preemployment and specific suspicion situations. It is apparent that the Union knew about, and did not seek to interfere with, the latter two types of tests, both of which long predated the Union's certification and which often have been, and are being, used by Respondent. General Counsel argues, and Respondent does not dispute, that the motive for tests given as a result of the Covington incident is unique, in that tests previously were not given in the same type of situation. However, there was no such situation at any other time, and in any event, motive here was not alleged in the pleadings as being, nor is it in law, relevant to the issue.

[7] See Kielty, *supra*.

Whether or not the Act was violated by Respondent's unilateral change of working conditions is a matter for factual determination, regardless of any motive that may be involved.[8]

General Counsel argues in his brief that the reason for, rather than the facts of, the Covington-related tests is what sets them apart from other tests, and makes them actionable.[9] However, as touched upon *supra*, the facts relative to the change, if any, must control the issue, and it is the facts that are analyzed herein.

As Mabry credibly explained, and as commonsense shows, the reason for polygraph tests is to maintain the security of Respondent's premises and their contents. Prehire tests were logical, commonplace, and well known to the Union and to Respondent's applicants and employees. The testimony of Nepveux and McLearen that they had not taken such tests and did not know about them, or about anyone taking them, is discussed *supra*. The fact that such tests were given on a rather haphazard basis is of no weight—they were, nonetheless, given and known about. Tests given upon suspicion of theft also were logical, were not rare, and were well known to the Union and to Respondent's employees. Mabry credibly testified that the Covington incident reminded him that several employees had not been tested before being hired, and that the warehouse employees were sent for tests partially for that reason and partially to ascertain whether or not he may have other Covington-type employees on the payroll. Nepveux' testimony supports Mabry on this point; she testified that Martinez told the employees that the tests triggered by Covington ". . . had to do with [our] employ, our applications." Clearly, Mabry felt uneasy because of the possibility that he had let his guard down by not testing all applicants before hiring them.

There is no evidence that the tests of May 1977 were any different from all the other polygraph tests given to Respondent's employees. The questions propounded to the Covington group were for security purposes and could not be different from questions propounded to job applicants and to employees who were suspected of stealing. General Counsel argues that none of the Covington group was shown to be suspected of anything, but that is without significance—applicants for employment are not suspected of anything, either, yet the Union did not object to such tests.

The employees, and their Union, did not raise the issue of time spent in taking tests or inconvenience, thus it appears that those matters were of minimal, if of any, concern. So far as the record shows, the employees took the tests on paid time.

It is clear from the foregoing that the tests of May 1977 did not constitute a change of past working conditions.[10] The tests of that date were a continuation of past business practices, and the tests were not actionable as alleged.[11]

Upon the basis of the foregoing findings of act, and the entire record, I make the following:

CONCLUSIONS OF LAW

1. Gulf Coast Automotive Warehouse, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL-CIO, CLC, Local 455 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not, as alleged, violate Section 8(a)(5) and (1) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The complaint is dismissed in its entirety.

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[8] *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962); *Peerless Food Products, Inc.*, 236 NLRB 161 (1978).

[9] In his brief, counsel for General Counsel argues that the charge and complaint herein are supported, in that Respondent must bargain over the issue of administering any polygraph tests to applicants or employees. That argument misses the point at issue, and is without merit. The pleadings, the Union's letter of May 16, the transcript of testimony, colloquies of counsel at hearing, briefs of counsel, and the facts of record make it quite clear that the issue is the alleged unilateral charge of May 1977, and not the general subject of giving polygraph tests to applicants and employees. The latter issue was not pleaded or litigated and is not decided.

[10] *Peerless Food Products, Inc., supra; Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978).

[11] *North Kingstown Nursing Care Center*, 244 NLRB 34 (1979); *Engineered Building Products, Inc.*, 162 NLRB 649 (1967).

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.